Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-398

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDGAR JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of their Sixth Amendment rights when they were not permitted to sit directly at the counsel table.

2. Whether petitioners' convictions should be reversed and the indictment dismissed on the ground that a law enforcement agent was sworn as an agent of the grand jury.

3. Whether the district court's instructions were consistent with *United States* v. *Enmons,* 410 U.S. 396 (1973).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 766 F.2d 994.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1985. The petition for a writ of certiorari was filed on September 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted on one count of extortion and one count of conspiring to obstruct interstate commerce by force and violence, in violation of 18 U.S.C. 1951 and 2. Petitioners were

sentenced to consecutive terms of three years' imprisonment on each count, with the sentences on the substantive count suspended in favor of two years' probation. Petitioner Stumbo was also convicted of using explosives to destroy property, in violation of 18 U.S.C. 844(i), and petitioner Meade was convicted on a second extortion count. Consecutive sentences on these counts were suspended in favor of probation. The court of appeals affirmed (Pet. App. 3a-22a).[1]

1. The evidence at trial, the sufficiency of which is not in dispute (see Pet. 23), showed that petitioners employed violence in an attempt to shut down the Ray-Mac Coal Company, a competitor of the JRM Coal Company. Petitioner Jones was part-owner and president of JRM, which marketed coal mined by a network of mine operators, including petitioner Stumbo, that had signed contracts with the United Mine Workers of America (UMWA). Petitioner Kinney was president of UMWA Local 5967. Pet. App. 4a-5a.

JRM provided coal under a long-term contract to South Carolina Electric and Gas Company. The contract contained a force majeure provision relieving JRM of its obligations in the event of a labor dispute. In early 1982, JRM's available coal stock was depleted, and Jones was concerned that Ray-Mac, which was not unionized, was attempting to jeopardize his contract with the utility by offering lower prices. To protect his interests, Jones arranged with Kinney and other officers of Local 5967 to stage a bogus strike at JRM's affiliated operators that would prevent access to Ray-Mac's mine as well as allow JRM to invoke the force majeure clause. Pet. App. 4a-5a.

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[1] Two counts were dismissed on motion of the government, and petitioners were acquitted on various other charges of extortion and the possession and use of explosives. Thirteen co-defendants were acquitted on all of the counts against them that went to the jury.

Pursuant to this plan, JRM's affiliates instructed their miners to go on strike, notwithstanding the absence of a labor dispute, in order to "shut down Ray-Mac" (C.A. App. 915). The purported strike was illegal because it was not authorized by the international union. JRM agreed to pay the striking miners' wages. Pet. App. 5a.

JRM also financed the purchase of a large number of weapons for the strikers. After initial attempts to prevent truckers from hauling coal from the Ray-Mac mine failed, armed men, including petitioners Stumbo, Kinney, and Rowland, went into the hills overlooking the mine and fired at Ray-Mac's miners and equipment in an effort to halt production. Pet. App. 5a. When these sniping attacks proved ineffective, Jones decided to blow up Ray-Mac's equipment. On February 21, 1982, Stumbo and an accomplice placed dynamite bombs on a bulldozer and a mining auger. The auger was heavily damaged, but the other bomb failed to explode because the fuse was crimped improperly. Shortly thereafter, at Jones' instigation, petitioner Meade and others destroyed a "tipple" (a device for loading coal into rail cars) that had been leased for use at the Ray-Mac site. *Id.* at 6a.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 3a-22a). The court concluded that the seating arrangements necessitated by trial of 18 defendants did not violate the Sixth Amendment because sufficient communication was permitted between petitioners and their counsel (*id.* at 20a). The court also held that the swearing of a law enforcement agent as an agent of the grand jury was not improper and did not prejudice petitioners (*id.* at 12a-14a). Finally, the court held that the district court's charge correctly instructed the jury under *United States* v. *Enmons*, 410 U.S. 396 (1973), that violence in pursuit of legitimate labor objectives does not violate the Hobbs Act, 18 U.S.C. 1951.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners "were convicted after a fair trial on the basis of overwhelming evidence" (Pet. App. 22a). Further review is unwarranted.

1. Because of the crowded courtroom conditions at trial, the 12 defense counsel were seated at an L-shaped table, while the 18 defendants were seated immediately behind the table in two rows of 9 each (see Pet. App. 47a, 53a). Petitioners' contention (Pet. 10-18) that this arrangement violated the Sixth Amendment by preventing their effective consultation with counsel is without merit.

As this Court has recently recognized, "[n]ot every restriction on counsel's time or opportunity * * * to consult with his client * * * violates a defendant's Sixth Amendment right to counsel." *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); see, *e.g.*, *United States* v. *Vasquez*, 732 F.2d 846, 848 (11th Cir. 1984). The district court has broad discretion, consistent with the Constitution, "to arrange the seating for defendants and counsel" in light of "a variety of factors," such as "the size of the courtroom, * * * the number of defendants and lawyers, * * * [and] security provisions." *United States* v. *Turkette*, 656 F.2d 5, 10 (1st Cir. 1981); see also, *e.g.*, *United States* v. *Walker*, 559 F.2d 356, 370 (5th Cir. 1977).

There was no abuse of that discretion in this case. Although petitioners were not seated at counsel table, the district court noted that they would be within "five or six feet" of their respective counsel and that they would be "close enough" to "get word to [counsel]" if they wished to confer (C.A. App. 695). And while the district court, "for security reasons," did not "want the [petitioners] up moving around the Court," it did allow counsel to walk to where their clients were seated and to confer with them freely during the trial (*ibid.*). Moreover, unlike in *Geders*

v. *United States,* 425 U.S. 80 (1976), the court did not restrict in any fashion petitioners' right to consult freely with counsel during the frequent recesses that occurred through the three months of trial. The practical necessity of accommodating the large number of defendants and counsel, as well as the security considerations arising from the trial of defendants charged with violent crimes and the introduction of large quantities of firearms and ammunition into evidence, amply justified the incidental restrictions on communication that resulted from the seating arrangement chosen by the district court.[2]

2. Petitioners argue next (Pet. 18-21) that the independence of the grand jury was compromised when a federal law enforcement officer assigned to the investigation, Dennis McAllister, was sworn as an agent of the grand jury. Although the court of appeals was willing to treat this argument as having been preserved (Pet. App. 9a-10a), we note that the claim should have been deemed

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[2] Petitioners' reliance (Pet. 14-15) on *United States* v. *Sorrentino,* 726 F.2d 876 (1st Cir. 1984), is completely misplaced. There, the court of appeals expressly upheld the district court's order seating the defendant apart from his counsel on the ground that the arrangement did not "prevent[] or unduly hinder[] communication between defendant and his counsel" (*id.* at 887). The court of appeals here reached precisely the same conclusion (Pet. App. 20a). Moreover, the court in *Sorrentino* recognized that "reasons of security or * * * practicality" are sufficient to seat a defendant apart from counsel (726 F.2d at 887). These are the same grounds supporting the seating arrangement in this case. *People* v. *Zammora,* 66 Cal. App. 2d 166, 152 P.2d 180 (1944), on which petitioners also rely (Pet. 14), is, in addition to its ancient vintage, wholly inapposite. In that case, the defendants were seated together as if in a " 'prisoners' box' " that was "in one part of the courtroom some distance away from the counsel table" (66 Cal. App. 2d at 227-228, 152 P.2d at 211), and counsel were prevented from conferring with their clients both in the courtroom and during recesses (*ibid.*). The court expressly left open the permissibility under the state constitution, which was there at issue, of circumstances like those here, where counsel are afforded free access to their clients for consultation (66 Cal. App. 2d at 234-236, 152 P.2d at 215).

waived because it was not presented in a timely fashion and petitioners advanced a different legal theory in the court of appeals from that presented to the district court. See Fed. R. Crim. P. 12(b)(1) and (2). In any event, petitioners' claim is without merit.

The "agent of the grand jury" issue is, in our view, a tempest in a teapot. While there is no compelling need to follow this practice, neither is it harmful. It is in fact a practice in a few judicial districts for federal investigative officers to be designated as "agents" of the grand jury. See, *e.g.*, *United States* v. *Cosby,* 601 F.2d 754, 757-758 n.6 (5th Cir. 1979); *United States* v. *Stanford,* 589 F.2d 285, 292 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); see also *United States* v. *Mara,* 410 U.S. 19, 20 (1973). This practice has probably evolved from the practical reality that law enforcement officers serve an important function in assisting the prosecutor to present evidence to the grand jury, including ministerial tasks on behalf of the grand jury such as serving subpoenas and accepting returns of documents. See generally S. Rep. 95-354, 95th Cong., 1st Sess. 6 (1977). As this Court has noted, the grand jury "would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands" because the grand jury "depends largely on the prosecutor's office to secure the evidence or witnesses it requires." *United States* v. *Sells Engineering, Inc.,* 463 U.S. 418, 430 (1983) (footnote omitted). True, being sworn as an agent of the grand jury is not essential to the role that law enforcement officers already play; if the judges of a particular district find this purely semantic designation undesirable, they are of course free to adopt a local rule forbidding it. But as a general matter, the mere swearing of an officer as an agent of the grand jury plainly is not so inherently pernicious or impervious to correction by other means as to warrant the dismissal of an indictment.

In the instant case, it is impossible to see how agent McAllister's designation as an agent of the grand jury could have done anything to undermine its independence. In that capacity, McAllister merely served subpoenas and received custody of exhibits (see C.A. App. 822-825, 845, 847-848). He also testified briefly on two occasions, once at the outset to give an overview of the investigation and once after the indictment was drafted to review its allegations. It can scarcely be reasonably contended that McAllister's innocuous caretaking functions as the grand jury's "agent" reduced that body to a mere tool of the prosecutor. Cf. *Sells Engineering*, 463 U.S. at 429 (emphasis and footnote omitted) (government attorneys are permitted in the grand jury room because "both the grand jury's functions and their own prosecutorial duties require it").[3]

In any event, petitioners suffered absolutely no prejudice from the swearing of agent McAllister as an agent of the grand jury. They "concede[d] that McAllister properly could investigate and report back to the grand jury, as well as summarize and retain custody of the evidence, all in his capacity as case agent" (Pet. App. 12a). Moreover, they "do not contend, nor could they in view of the weight of the evidence against them, that, but for McAllister's being sworn as an 'agent of the grand jury', [they] would not have been indicted" (*id.* at 13a). Such prejudice, however, is an indispensable prerequisite to the dismissal of the indictment on the basis of the courts' supervisory powers. See *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Morrison*, 449 U.S. 361 (1981). Finally, peti-

[3] Petitioners rely (Pet. 19) primarily on opinions of two district judges who have criticized the practice of designating grand jury agents. *United States* v. *Kilpatrick*, 594 F. Supp. 1324, 1328-1331 (D. Colo. 1984); *United States* v. *Anderson*, 577 F. Supp. 223, 232-233 (D. Wyo. 1983); *United States* v. *Kilpatrick*, 575 F. Supp. 325, 327-330 (D. Colo. 1983). Our appeals in these cases have been argued and are currently pending before the Tenth Circuit.

tioners' convictions by a petit jury conclusively establish the existence of probable cause to prosecute. The defect that they assert in the grand jury proceeding is no ground for conferring on petitioners the windfall of a reversal of their convictions obtained following a three-month trial. See, *e.g.*, *United States* v. *Thibadeau*, 671 F.2d 75, 77-78 (2d Cir. 1982); *United States* v. *Brien*, 617 F.2d 299, 313 (1st Cir.), cert. denied, 446 U.S. 919 (1980).[4]

3. Last, petitioners argue (Pet. 21-26) that the district court's instructions were inconsistent with *United States* v. *Enmons*, 410 U.S. 396 (1973), where the Court held that acts of violence committed by union members in support of lawful collective bargaining demands for higher wages are immune from prosecution under the Hobbs Act. There is good reason to doubt that petitioners were entitled to an *Enmons* instruction,[5] in which event any error in the

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[4] As in *United States* v. *Griffith*, 756 F.2d 1244 (6th Cir. 1985), cert. denied, No. 84-6876 (Oct. 7, 1985), there is no need to hold this petition pending the Court's decision in *United States* v. *Mechanik*, cert. granted, No. 84-1640 (June 17, 1985). *Mechanik* presents the question whether a violation of Fed. R. Crim. P. 6(d) may be grounds for dismissal of an indictment in the absence of prejudice. The court of appeals in that case relied heavily on the language and purpose of Rule 6(d), which limits who may be present before the grand jury, in fashioning its rule of per se dismissal (see 735 F.2d 136, 139 (4th Cir. 1984)). Whatever the merits of the court's reasoning with respect to Rule 6(d), it has no application here, where no violation of that Rule is claimed. As the cases cited in text make clear, the general rule is that prejudice must be shown to warrant dismissal of the indictment. *Mechanik* presents the question whether violations of Rule 6(d) should be treated as an exception to that rule.

[5] The courts of appeals have consistently refused to extend the labor exemption beyond the labor-management relations context presented in *Enmons*, and this Court has consistently denied review where it has been sought. See, *e.g.*, *United States* v. *Clemente*, 640 F.2d 1069, 1076-1078 (2d Cir.), cert. denied, 454 U.S. 820 (1981); *United States* v. *French*, 628 F.2d 1069, 1074-1075 (8th Cir.), cert. denied, 449 U.S.

instruction would not have been prejudicial and could not justify reversal of their convictions. But in any event the district court's instructions, viewed in their entirety (*e.g., Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973)), correctly presented the *Enmons* defense—that petitioners' acts of violence occurred in furtherance of legitimate union organizing activity at Ray-Mac—to the jury.

As the court of appeals observed, the charge was "carefully structured * * * [in] two parts[:]" the first part "assume[d] that [petitioners] acted in pursuit of legitimate union objectives" while the second "assumed a finding of improper purpose behind the acts of violence" (Pet. App. 18a). Under *Enmons,* the district court stated first, "a legitimate labor activity in a labor dispute in support of a proper labor objective cannot constitute extortion, * * * notwithstanding violence and threats may have occurred in support of such proper union objective" (*id.* at 64a). The court further stated that "organizing the employees of a business" was a "proper union objective within the *Enmons* exception" (*ibid.*). Moreover, the court made clear that "violence and threats" that "honestly occur[red] as a by-product of a legitimate labor activity" were beyond the reach of the Hobbs Act (*ibid.*). In the second part of its instruction, the court stated that *Enmons* did not provide a defense to extortionate activities committed during

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956 (1980); *United States* v. *Cerilli,* 603 F.2d 415, 419-420 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Quinn,* 514 F.2d 1250, 1256-1259 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976). Here, unlike in *Enmons,* the violence was not committed in a collective bargaining context or against the strikers' own employer, and petitioners' conduct was at the very least arguably unlawful under the federal labor statutes. The *Enmons* labor exemption has no application in such a context. See, *e.g., United States* v. *Wilford,* 710 F.2d 439, 444 (8th Cir. 1983), cert. denied, 464 U.S. 1039 (1984). For these reasons, the district court "came very close" (C.A. App. 1838, 1839) to omitting a charge on the *Enmons* defense and gave one only out of an abundance of caution.

"mere pretext[ual] [or] feigned" labor disputes or for the purpose of "wrongfully depriv[ing] or deny[ing] the right to do business and legitimately compete with another" (Pet. App. 66a). The court also made it clear that it was the government's burden to establish beyond a reasonable doubt that petitioners' activities did not come within the exemption (*id.* at 64a).

In the face of this comprehensive and correct statement of the law, petitioners rely only on isolated portions of the charge taken out of context to support their claim of error.[6] For example, petitioners contend (Pet. 23) that the court's statement that "use of firearms 'to coerce and prevent employees from working is not a legitimate labor activity within the *Enmons* exception' " was erroneous. As they did in the court of appeals (see Pet. App. 19a), however, petitioners ignore the immediately preceding portion of the instruction, which makes clear that the district court was speaking only of the use of firearms outside the context of a legitimate labor activity (*id.* at 66a).

Similarly, petitioners fault (Pet. 24) the district court for instructing the jury that labor activities not authorized by the UMWA were not within the *Enmons* exemption. Petitioners' undisputed failure to follow the binding obligations imposed by the union's constitution, however, plainly placed them outside of the exemption. See, *e.g.*, *United States* v. *Cusmano,* 729 F.2d 380 (6th Cir. 1984), cert.

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[6] Petitioners also point (Pet. 23-24) to changes suggested by the government during the Rule 30 conference. These changes were offered at a time when the court's proposed instructions incorrectly defined the term "wrongful" (see C.A. App. 1815, 1832-1833, 1851-1852, 1883-1884). After the conference, the court changed its definition of wrongfulness (see *id.* at 1898) to comport with *Enmons* by accepting the government's proposed definition (see *id.* at 1994), thereby eliminating the basis for many of the government's suggestions concerning other aspects of the instructions.

denied, No. 83-1719 (June 18, 1984).[7] Finally, petitioners rely (Pet. 24) on the district court's instruction that " '[a] legitimate act wrongfully performed may become unlawful and outside the protection of the *Enmons* exception.' " Even if this single statement (which, properly understood, required simply that the alleged violence be connected with a legitimate labor dispute to come within *Enmons*) was "somewhat confusing" (Pet. App. 19a), it did not materially detract from the charge as a whole. That charge "more than adequately focused the jury's collective mind on the distinction in *Enmons* between wrongful ends and wrongful means" (*ibid.*). Nothing more was required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

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[7] Petitioners' contention (Pet. 24) that the instruction allowed the government to regulate wildcat strikes is unfounded because there was no wildcat strike in this case. Ray-Mac's employees, who were not unionized, did not go out on strike, and the employees of JRM's affiliates did so only at the request of their employers, not as a result of a labor dispute with them.